# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>August 14, 2003 |
| v | No. 236168<br>Ottawa Circuit Court |
| WILLIAM DAVID BEEKMAN,<br><br>Defendant-Appellant. | LC No. 00-023848-FH |

Before: Whitbeck, C.J., and Smolenski and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree child abuse, MCL 750.136b(2), for injuries inflicted on the two-year-old child of his fiancée. Defendant was sentenced to 48 to 180 months' imprisonment. He appeals as of right. We affirm.

On April 12, 2000, the victim was left in defendant's sole care while the mother was out. The victim was recovering from a broken tibia at the time, but was otherwise in good health. When the victim's mother returned home, defendant told her that he accidentally burned the victim when he placed her into the bathtub without checking the temperature of the water. The victim was taken to the hospital the next day, where she was diagnosed with severe burns caused by a "pouring-type" action and three ankle fractures.

I

Defendant first argues that the evidence was insufficient to support a conviction for first-degree child abuse. Specifically, he argues that the medical evidence did not support the existence of serious physical harm, a necessary element under MCL 750.136(b)(2). When reviewing the sufficiency of the evidence in a criminal case, we "view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997) (citation omitted). All conflicts with respect to the evidence must be resolved in favor of the prosecution. *Id.* Also, we will not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992).

MCL 750.136b(2) provides:

> A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child.

MCL 750.136b(1)(f) defines serious physical harm as follows:

> [A]ny physical injury to a child that seriously impairs the child's health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut.

Viewed in a light most favorable to the prosecution, we conclude that the evidence supports a finding of serious physical harm. The evidence disclosed that the victim sustained serious burns and ankle fractures, injuries that are specifically included in the plain language of the criminal statute, and the injuries could not have been self-inflicted. Further, there is no question that the injuries were "physical injuries that seriously" impaired the victim's health and well-being. The victim could not bear any weight on her right ankle. It was fractured in three places, and testimony revealed that the fractures were caused by a great amount of force, and caused significant pain to the victim.

With respect to the burns, the victim's mother testified that the skin was coming off in chunks the morning after the burns were sustained. The first physician who saw the victim testified that the injuries were very serious and required treatment at a burn center. The burns covered between thirteen and fifteen percent of the victim's body, and she needed intravenous and oral fluids, burn treatment, pain control, and control for her high temperature. Additionally, her heart was tachycardic. The burns were classified as serious by every treating physician who testified about them, and there was a potential for scarring and infection. Furthermore, there was a potential of dehydration, which may cause death in a burn patient. While no skin grafting was required, the victim was hospitalized for almost two weeks, receiving specialized treatment for the burns, and experienced pain for twelve to fourteen days. On this record, we find that a rational trier of fact could have found that the essential element of serious physical harm was proven beyond a reasonable doubt. Therefore, the evidence was sufficient to support defendant's conviction of first-degree child abuse.

We decline defendant's invitation to apply the requirements of Michigan's no-fault act, MCL 500.3103 *et seq.*, to the statute proscribing first-degree child abuse. The plain language of MCL 500.3135 requires the existence of a serious impairment of a body function or permanent serious disfigurement to prevail in a tort action. In contrast, MCL 750.136b(2), the statute at issue here, does not require a finding of serious impairment of a body function, permanent serious disfigurement, or even a disabling injury. By its plain language, it requires only the existence of *any* physical injury that seriously impairs the health or physical well-being of the child. Thus, the injuries in this case fall within the plain, unambiguous language of the child abuse statute.

II

Defendant next argues that he was denied a fair trial because the trial court abused its discretion by admitting evidence of the prior tibia fracture. MRE 404(b). Defendant argues that

the evidence was not used for a proper purpose and that any probative value was outweighed by the danger of unfair prejudice. We review this preserved evidentiary issue for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

MRE 404(b) provides:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in this case.

MRE 404(b) is a rule of inclusion. *People v Pesquera*, 244 Mich App 305, 317; 625 NW2d 407 (2001). Relevant, other-acts evidence does not violate MRE 404(b) unless offered only to show the criminal propensity of an individual to establish that he acted in conformity therewith. *Crawford*, *supra* at 385. In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994), the Court clarified the test to determine the admissibility of other bad acts evidence:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

It is insufficient for the prosecution to merely recite one of the purposes articulated in MRE 404(b). *Crawford, supra* at 387. It must also demonstrate that the evidence is relevant. *Id.*

Here, the prosecutor offered evidence of the victim's prior tibia fracture to rebut any claim of accident with respect to the charged injuries, i.e., the other-acts evidence was relevant to prove that the abuse was part of defendant's scheme, plan or system. Other acts evidence is admissible to show a plan or scheme if the charged conduct is sufficiently similar to the evidence of the uncharged conduct to support an inference that they are both manifestations of a common plan, scheme, or system. *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). We find that the conduct in this case was sufficiently similar.

Common features between the charged and uncharged conduct included: (1) defendant was alone with the victim at the time of the injuries and solely in charge of her care; (2) tremendous force was used to cause the fractures suffered by the victim; (3) both types of bone fractures sustained were unusual or rare injuries; and (4) none of the victim's injuries, including the burns, could be categorized as self-inflicted. In addition, defendant claimed that the upper tibia fracture and the burns were accidents, and he tried to first treat these injuries at home, delaying seeking medical treatment for the victim. Finally, the other-acts evidence of the tibia fracture was logically relevant to support the diagnosis of battered child syndrome, which requires consideration of a victim's history.

We further find that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence of the victim's prior tibia fracture. MRE 403. While all relevant evidence is inherently prejudicial and damaging, only unfairly prejudicial evidence requires exclusion. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, modified on other grounds 450 Mich 1212 (1995). Relevant considerations in determining unfair prejudice include whether the jury will give the evidence undue or preemptive weight and whether the use of the evidence is inequitable. *Id.* at 75-76. Here, the record does not indicate that the evidence was given undue or preemptive weight, or that its use was inequitable. The prosecutor used the evidence to argue that the victim's injuries were not accidental as defendant claimed, but rather, were part of a pattern of abuse that occurred when the victim was alone with defendant. Moreover, the trial court cautioned the jury on the limited use of the evidence during final jury instructions, instructing that the evidence may not be used as propensity evidence. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, we conclude that the trial court did not abuse its discretion in admitting the evidence.

III

Defendant also argues that he was denied a fair trial because certain bad acts evidence was admitted without proper notice, contrary to MRE 404(b). Specifically, defendant challenges Dr. Ottens' testimony that, when he treated the victim's upper tibia fracture, he observed an older injury to the growth plate in the victim's right knee, which was probably trauma related. Defendant also challenges Dr. Francis' testimony that he observed a pattern of needle marks on the victim's foot while she was in the burn center. Because defendant did not object to this evidence at trial, we review this issue for plain error only. *People v Carines*, 460 Mich 750, 752-753, 763; 597 NW2d 130 (1999).

In an extremely cursory argument, defendant cites MRE 404(b) and outlines the alleged objectionable evidence. However, he fails to explain or rationalize why the admission of the evidence constitutes plain error requiring reversal. He further fails to argue or explain how any error in the admission of the evidence affected the outcome of his trial. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Because defendant has not sustained his burden of demonstrating a plain error affecting his substantial rights, appellate relief is not warranted. For the same reasons, we decline to address defendant's argument that the prosecutor committed misconduct during both his opening statement and his direct examination of the victim's mother.

IV

Defendant further argues that the prosecutor improperly injected evidence of his unemployment status and poverty into trial. We review this unpreserved issue for plain error only. *Carines, supra* at 763.

> Evidence of poverty and unemployment to show motive is generally not admissible because its probative value is outweighed by unfair prejudice and discrimination toward a large segment of the population, and the risk is that the

> jurors will view defendant as a "bad man." [*People v Stanton*, 97 Mich App 453, 460; 296 NW2d 70 (1980) (citations omitted).]

Evidence of financial condition is not, however, precluded in every instance. *People v Henderson*, 408 Mich 56, 62-63; 289 NW2d 376 (1980). In *People v Conte*, 152 Mich App 8, 14; 391 NW2d 763 (1986), this Court recognized that evidence of unemployment or poverty may be admitted to rebut a defendant's theory of the case.

In his opening statement, the prosecutor indicated that the evidence would show that the victim's mother and defendant maintained only sporadic employment. The prosecutor mentioned the issue in the context of offering his theory that there were several stressors in the household at the time the victim was injured. Like the prosecutor, defendant also raised the issue of unemployment in his opening statement. Defendant planned to present evidence that he was a wonderful parent and that the burns were caused by an accident. His counsel indicated that defendant wanted to raise the victim as part of his family and was responsible for her day-to-day care when he was not working. Considered in context, it is apparent that the issue of unemployment was not raised for an improper purpose, such as to argue motive or predisposition to commit the crime. Indeed, outside of his opening statement, the prosecutor questioned the victim's mother about unemployment only briefly, and never mentioned the issue during closing argument. Even if the introduction of the issue of unemployment could be characterized as plain error, reversal is not required because we find that defendant cannot demonstrate that the brief references by the prosecutor affected the outcome of the trial. *Carines, supra.* Indeed, defendant makes no attempt to argue that his substantial rights were affected by the challenged references. Accordingly, appellate relief is not warranted.

V

Defendant next argues that the trial court improperly refused to permit the victim's mother to testify that, when she asked the victim how her injuries occurred, the victim replied that the "bath was too hot." This alleged exchange occurred two months after the victim's injuries were sustained. We review the trial court's decision to exclude this evidence for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

On appeal, defendant makes a cursory and confusing argument that his due process right to a fair trial was violated. He appears to contend that the challenged testimony was extrinsic evidence of the victim's prior inconsistent statement and should have been admitted as such. Clearly, however, the alleged statement is not a prior inconsistent statement subject to admission under MRE 613. MRE 613 permits extrinsic evidence of a witness' prior inconsistent statement only if the witness is afforded an opportunity to explain or deny the statement. In this case, the two-year-old victim was not a witness at trial. Additionally, the testimony was hearsay, and defendant cites no other rule under which the testimony would have been admissible. We conclude that the trial court did not abuse its discretion in excluding the statement.

VI

Finally, defendant further argues that resentencing is required because the trial court improperly departed from the recommended sentencing range. The legislative sentencing

guidelines apply to offenses committed after January 1, 1999. MCL 769.34(2); *People v Greaux*, 461 Mich 339, 342 n 5; 604 NW2d 327 (2000). MCL 769.34(3) provides:

> A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. All of the following apply to a departure:
>
> (a) The Court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.
>
> (b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

A departure must be based on objective and verifiable factors. *People v Babcock (Babcock I)*, 244 Mich App 64, 75; 624 NW2d 479 (2000). Whether a factor is objective and verifiable is reviewed as a matter of law, but the determination that there are substantial and compelling reasons for a departure is reviewed for an abuse of discretion. *Id.* at 75-76. Reasons justifying departure from the guidelines should irresistibly grab the court's attention and be recognized as having considerable worth in deciding the length of the sentence. *Id.* at 75. Further, the principle of proportionality may be considered in evaluating the extent of a departure. *People v Babcock (Babcock II)*, 250 Mich App 463, 468-469; 648 NW2d 221 (2002), lv gtd 467 Mich 872 (2000), citing *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001).

In this case, the trial court departed from the recommended minimum sentence range of nineteen to thirty-eight months' imprisonment and sentenced defendant to a minimum prison term of forty-eight months, stating:

> I am going to exceed the guidelines in this case. And it's the sentence of this Court that you be turned over to the Michigan Department of Corrections to serve a term of not less than 48 months nor more than 180 months. I am exceeding the guidelines because I don't believe that the guidelines adequately take into consideration the course of torture and abuse that this child was subjected to over a period of time, beginning with the tibia fracture and continuing through this case. It is a pattern of serious infliction, intentional infliction of painful injuries, a delay in the seeking of treatment, all of which resulted in significant suffering for this child, which I don't believe is adequately considered by the guidelines. Even Offense Variable 7 does not consider the fact that this is part of a syndrome which has been ongoing for sometime.

Defendant asserts that the trial court's cited reasons are not substantial and compelling, and they were adequately accounted for by the scoring of offense variable ("OV") 7, which was

scored at fifty points.[1] We disagree. OV 7 relates to aggravated physical abuse. MCL 777.37. Fifty points are to be scored if the victim "was treated with terrorism, sadism, torture, or excessive brutality." MCL 777.37(1). The plain language of OV 7 does not encompass *prior* injuries, torture or abuse suffered by a victim at the hands of a defendant. It was this aspect of the case, the fact that the victim was a battered child, that accounted for the upward departure in defendant's minimum sentence.

Additionally, the record contained objective and verifiable support for the trial court's determination that defendant was responsible for the victim's previously fractured tibia and that he failed to seek immediate medical attention for that injury. Defendant admitted to the police that he believed his actions may have caused the tibia fracture. As a result, the two-year-old victim was in a full leg cast for several weeks. Within one week of having the cast removed, she was horribly burned and sustained three fractures to her ankle. And again, she was denied immediate medical attention. There was expert testimony that the victim suffered from battered child syndrome and had many bruises on her body when taken to the emergency room after sustaining the burns and ankle fractures. The trial court did not abuse its discretion in departing from the recommended sentence range. Therefore, we find that objective and verifiable factors existed that were not adequately accounted for by the guidelines.

Accordingly, we hold that the trial court did not abuse its discretion in determining that these reasons provided a substantial and compelling basis for departing from the guidelines. Further, the extent of the trial court's departure was only ten months. Under the circumstances of this case, we are not persuaded that this departure is disproportional. *Babcock II*, *supra* at 468-469.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael R. Smolenski
/s/ Christopher M. Murray

[1] Defendant also argues that he was improperly scored fifty points for offense variable 7. This issue is not properly presented to this Court because it was not raised in the statement of questions presented. Thus, review is inappropriate. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).